

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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GATEWAY, INC., and  
GATEWAY COMPANIES, INC.,

Plaintiffs,

07 Civ. 6732 (CM)

-against-

ACS COMMERCIAL SOLUTIONS, INC.,

Defendant.

\_\_\_\_\_  
MEMORANDUM DECISION AND ORDER GRANTING  
MOTION TO DISMISS STATE LAW CLAIMS AND  
TO STRIKE THE DEMAND FOR A JURY TRIAL

McMahon, J.:

The motion to dismiss plaintiff's state law claims (Counts 1 and 2) is granted, and those claims are dismissed with prejudice, because they are preempted by ERISA.

Plaintiffs concede that their claims for breach of contract and negligence in connection with Defendant's actions as the administrator of plaintiffs' ERISA Employee Benefits Plan are preempted if ACS does not contest that it is a fiduciary under the Plan. (Memorandum in Opposition to Motion at 1, 4 and 5). ACS has conceded that it is an ERISA fiduciary with respect to the administration of benefits under the Plan, albeit solely in the context of this lawsuit. (Reply Memorandum of Law). Therefore, there is no need for plaintiff to plead "in the alternative" claims that are purely duplicative of its Third Cause of Action, which is brought under ERISA.<sup>1</sup>

Because there is no right to a trial by jury for a claim brought under ERISA, the plaintiff's jury demand is stricken as well.

This constitutes the decision and order of the Court.

Dated: April 10, 2008

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<sup>1</sup> The two state law claims are also duplicative of each other, and it is well settled under New York law that claims for both negligence and breach of contract do not lie on the facts pleaded.



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U.S.D.J.

BY ECF TO ALL COUNSEL